STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 24, 2007
v	No. 266236 Oakland Circuit Court
DANIEL ANTAUN JENKINS, Defendant-Appellant.	LC No. 2004-198320-FC

Before: Cavanagh, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of armed robbery, MCL 750.529. The trial court sentenced defendant to twelve to thirty years' imprisonment. We affirm defendant's conviction but remand to the trial court for resentencing.

On May 18, 2003, at approximately 5:00 a.m., three men entered the Fairfield Inn Hotel in Auburn Hills brandishing handguns. The men were wearing masks, gloves, and hooded sweatshirts. They tied the desk clerk's hands behind his back using a green jump rope. They stole $828.55 in bills and coins from the hotel. As the perpetrators were leaving the hotel, the desk clerk heard one of them say something that sounded like "Hey, Corn, let's go." According to the desk clerk, one of the perpetrators was wearing light gray sweatpants, another was wearing dark colored sweatpants, and the third was wearing black pants with white stripes down the sides of the legs. Surveillance footage from the hotel revealed that one of the suspects was wearing a sweatshirt with a sunburst design and the letter "M" outlined in thread on the back. The clerk was unable to see the perpetrators' faces during the robbery. He testified at trial that the men were between eighteen and twenty-five years of age and that they were approximately five feet, nine inches tall. He also stated that two of the men weighed approximately 160 to 170 pounds and one man, who was African-American and was wearing green plaid boxer shorts, weighed approximately 240 pounds. The desk clerk was unable to identify any of the perpetrators in a police lineup. However, he later informed police that he recognized one of the men in the lineup as a former hotel guest. The man identified by the desk clerk was defendant. The clerk told police that he saw defendant at the hotel two or three weeks before the robbery, but he did not know if defendant was one of the perpetrators of the robbery.

Defendant contends that the prosecution failed to present sufficient evidence to support his conviction. In reviewing a challenge to the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of

fact could have concluded that the prosecution proved all the essential elements of the crime beyond a reasonable doubt. *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003). "'Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.'" *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000), quoting *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). The standard of review is deferential and, therefore, we must draw all reasonable inferences and resolve credibility conflicts in favor of the jury verdict. *Nowack*, *supra* at 400.

Defendant also contends that the verdict in this case was against the great weight of the evidence. Because defendant failed to move for a new trial below, we review this issue for plain error affecting substantial rights. *Carines*, *supra* at 763-764; *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997).

To sustain a conviction for armed robbery in this case, the prosecution was required to establish the existence of the following elements beyond a reasonable doubt: "(1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while . . . defendant [was] armed with a [dangerous] weapon . . . ." *Carines*, *supra* at 757; see also MCL 750.529 and MCL 750.530. The prosecution in this case relied, in part, on an aiding and abetting theory. See MCL 767.39 and *Carines*, *supra* at 757-758.

The prosecution presented sufficient evidence to prove that an armed robbery was committed at the hotel. First, the prosecutor presented sufficient evidence to prove, beyond a reasonable doubt, that an assault occurred. An assault is defined as "an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995) (internal citation and quotation marks omitted). The evidence in this case established that the masked perpetrators entered the hotel brandishing handguns. They tied the desk clerk's hands behind his back, led him at gunpoint to the location of the money, and threatened to kill him if he did not tell them the combination to the hotel safe. Second, the prosecutor presented uncontroverted testimony that the perpetrators removed $828.55 from the hotel in the desk clerk's presence. Third, the desk clerk testified that all three men were armed with handguns during the robbery. A gun is, in fact, a dangerous weapon. See *People v Jolly*, 442 Mich 458, 468; 502 NW2d 177 (1993).

Furthermore, the prosecution presented sufficient evidence from which a rational jury could have concluded, beyond a reasonable doubt, that defendant committed the armed robbery or that he aided and abetted in the commission of the armed robbery. The evidence presented at trial established that, on the night of May 17, 2003, defendant and his ex-girlfriend Kendra Lewis stayed at the Extended Stay Hotel, which was directly adjacent to the Fairfield Inn. It was defendant's idea to stay at the hotel. He left his hotel room after midnight and returned in the early morning hours. Some time after defendant returned to the hotel room, Kendra awoke and found a large amount of pennies on the floor and $218 in cash in the hotel room. Although defendant claimed that Kendra gave him the cash, she told police that she did not know the source of the money.

A search of Kendra's van revealed clothing that was similar to the clothing worn by the perpetrators of the armed robbery. Police found gloves, sweatpants, a pair of black pants with white stripes going down the sides of the legs, a pair of green plaid boxer shorts, and sweatshirts,

including a sweatshirt with a sunburst design and an "M" outlined in thread on the back. Police also discovered ammunition for .38-caliber and nine-millimeter weapons. Police also found rolls of coins in the van that were similar to the rolls of coins taken from the hotel during the robbery, and they found a blue jump rope in the van, which was similar to the green jump rope used to tie the desk clerk's hands behind his back during the robbery. Kendra told police that one of her daughters had a blue jump rope and that her other daughter had a multicolored green, yellow, and pink jump rope. After the robbery, the multicolored green, yellow, and pink jump rope was missing. Additionally, at trial, Kendra testified that defendant's nickname was "AC," which stood for "Acorn."

Kendra's sister, Felicia Lewis, testified at trial that defendant came to her house on May 21, 2003, after the incident at the Extended Stay. He called his friend Maurice Threlkeld, a suspect in the robbery, from Felicia's home telephone.[1] Trial testimony also revealed that, when defendant was interrogated by police, he said "you don't got me for the Fairfield" before detectives mentioned the robbery. During the interrogation, defendant relayed specific details about the robbery to the detectives. He told detectives that neither a .38-caliber nor nine-millimeter handgun was used in the robbery and that the blue jump rope police recovered from Kendra's van was not used during the robbery. Defendant admitted to the police, at one point, that all of the men's clothing in the van, except for one "red, white and grey Gear" shirt, belonged to him.[2] He also admitted that the .38-caliber ammunition belonged to him.

Viewing all the evidence in the light most favorable to the prosecution, a rational trier of fact could have concluded that the prosecution proved all the essential elements of armed robbery beyond a reasonable doubt. Defendant nevertheless argues that this Court should reverse his conviction because the prosecutor failed to present direct evidence linking him to the crime scene. However, it is well established that "'[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.'" *Nowack, supra* at 400, quoting *Carines, supra* at 757. Further, although defendant denied any involvement in the robbery, in determining whether sufficient evidence has been presented, "[t]his Court will not interfere with the trier of fact's role in determining the weight of the evidence or the credibility of witnesses." *People v Williams,* 268 Mich App 416, 419; 707 NW2d 624 (2005). This Court must draw all reasonable inferences and resolve credibility conflicts in favor of the jury verdict. *Nowack, supra* at 400.

Defendant also argues that the jury could reasonably have inferred that he was not involved in the robbery and that he was, at most, an accessory after the fact. Defendant correctly asserts that the aiding and abetting statute does not include accessories after the fact. See *People v Lucas,* 402 Mich 302, 304-305; 262 NW2d 662 (1978). However, assuming arguendo that it would be reasonable for the jury to reach such a conclusion in this case, "the prosecutor need not negate every reasonable theory consistent with innocence." *Nowack, supra* at 400. The prosecutor presented sufficient evidence to sustain defendant's conviction.

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[1] Felicia denied telling the police that she overheard that conversation and that in it, defendant told Threlkheld to "get rid of the masks."

[2] Defendant later denied that the sweatshirt with the sunburst design belonged to him.

Defendant additionally argues that the jury's verdict was against the great weight of the evidence. "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). Defendant argues that the verdict was against the great weight of the evidence because his physical characteristics did not match the desk clerk's description of the perpetrators. However, according to the desk clerk, one of the perpetrators was an African-American male, age eighteen to twenty-five, who was about five feet, nine inches tall, and weighed 240 pounds. Defendant is an African-American male. He was twenty-one years old at the time of the robbery. He is approximately six feet, two inches tall. A police officer testified at trial that, in his estimation, defendant weighed between 250 and 260 pounds. Although there were some discrepancies between the desk clerk's description of the assailants and defendant's appearance, the discrepancies do not preponderate so heavily against the verdict that it would be a miscarriage of justice to let the verdict stand. See *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). The remainder of defendant's arguments regarding the weight of the evidence relate to inconsistencies in the witnesses' testimony. However, "'[c]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.'" *Musser, supra* at 219, quoting *People v Lemmon*, 456 Mich 625, 647; 576 NW2d129 (1998).

Defendant next contends that the desk clerk's testimony regarding the perpetrator's remark, "Hey, Corn, let's go," was inadmissible hearsay. Generally, a trial court's evidentiary decisions are reviewed for an abuse of discretion. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). However, "[w]hen the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed do novo." *Id.* at 670-671.

Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay evidence is generally inadmissible. MRE 802. As used in the definition of hearsay, the term "statement" means an assertion or nonverbal conduct intended as an assertion. MRE 801(a); *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 204; 579 NW2d 82, mod 458 Mich 862 (1998). By definition, the remark "Hey, Corn, let's go" was not hearsay. Indeed, the remark "Hey, Corn, let's go" was a command and not an assertion, and therefore the remark did not qualify as a statement and was not hearsay. *Id*. at 204-205.

Furthermore, the remark was subject to admission under the provision allowing for statements made by a coconspirator. "[A] statement is not hearsay if the statement is offered against a party and is 'a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy.'" *People v Martin*, 271 Mich App 280, 316; 721 NW2d 815 (2006), quoting MRE 801(d)(2)(E).

> In order to qualify under the exclusion for statements by a coconspirator, the proponent of the statements must establish three things. First, the proponent must establish by a preponderance of the evidence that a conspiracy existed through independent evidence. A conspiracy exists where two or more persons combine with the intent to accomplish an illegal objective. It is not necessary to offer direct proof of the conspiracy. Instead, it is "sufficient if the circumstances, acts,

> and conduct of the parties establish an agreement in fact." Circumstantial evidence and inference may be used to establish the existence of the conspiracy. Second, the proponent must establish that the statement was made during the course of the conspiracy. The conspiracy continues "until the common enterprise has been fully completed, abandoned, or terminated." Third, the proponent must establish that that statement furthered the conspiracy. The requirement that the statements further the conspiracy has been construed broadly. Although idle chatter will not satisfy this requirement, statements that prompt the listener, who need not be one of the conspirators, to respond in a way that promotes or facilitates the accomplishment of the illegal objective will suffice. [*Martin, supra* at 316-317 (internal citations omitted).]

A statement can be admitted as a statement of a conspirator "even absent a charge of conspiracy as long as 'there is independent evidence of the required concert of action.'" *Id.* at 319, quoting *People v Ayoub*, 150 Mich App 150, 152; 387 NW2d 848 (1985).

In this case, the prosecutor established by a preponderance of the evidence that defendant conspired with other perpetrators to commit the armed robbery. Three perpetrators entered the hotel at the same time. They were each carrying a handgun and were dressed in similar clothing, including hooded sweatshirts, sweatpants, gloves, and masks. During the robbery, the perpetrators acted in concert. They tied the desk clerk's hands behind his back, led him to the location of the money, took the money, and left the hotel at the same time. Thus, the prosecutor presented sufficient evidence to raise an inference that the three perpetrators worked together to commit the armed robbery. "What the conspirators actually did in furtherance of the conspiracy is evidence of what they had agreed to do." *People v Hunter*, 466 Mich 1, 9; 643 NW2d 218 (2002). Further, the remark at issue, "Hey, Corn, let's go," was clearly made during the existence of the conspiracy. The remark was made as the perpetrators were leaving the hotel, before the common enterprise had been "fully completed, abandoned, or terminated." *Martin, supra* at 317 (internal citation and quotation marks omitted). "It is well settled that admissions and statements are admissible against another defendant if there exists a concert of action between the defendants and the statements are made while the common scheme or plan is still in effect." *People v Nelson*, 168 Mich App 781, 791; 425 NW2d 225 (1988). Finally, the remark was made in furtherance of the conspiracy. The remark prompted one of the coconspirators to leave the hotel, promoting the accomplishment of the robbery. *Martin, supra* at 317. Thus, the remark was admissible under MRE 801(d)(2)(E).

Defendant also contends that the trial court erred in allowing the prosecutor to present rebuttal evidence of Kendra and Felicia's prior inconsistent statements. Extrinsic evidence may not be used to impeach a witness on a collateral matter. *People v Teague*, 411 Mich 562, 566; 309 NW2d 530 (1981). However, extrinsic evidence of a prior inconsistent statement may be used to impeach a witness on a material or related matter. See MRE 613(b). The prosecutor presented rebuttal testimony concerning Kendra's prior inconsistent statements regarding the color of the jump ropes that her children received from their grandmother and the number of pennies that she saw on the floor in her hotel room on the morning of May 18, 2003. The prosecutor also presented rebuttal testimony concerning Felicia's prior inconsistent statements regarding the telephone conversation that took place between defendant and Threlkeld on May 21, 2003. Evidence regarding the jump ropes, the pennies, and defendant's telephone

conversation with one of the robbery suspects was clearly relevant to the determination of defendant's guilt in this case. These matters were not collateral. Thus, the trial court did not abuse its discretion in ruling that the evidence was admissible to rebut the witnesses' testimony. MRE 613(b). "Rebuttal testimony may be used to contradict, repel, explain, or disprove evidence presented by the other party in an attempt to weaken and impeach it." *People v Rice (On Remand)*, 235 Mich App 429, 442; 597 NW2d 843 (1999) (internal citation and quotation marks omitted); see also *People v Spanke*, 254 Mich App 642, 644-645; 658 NW2d 504 (2003).

Defendant next contends on appeal that his trial counsel was ineffective for failing to meet with him for more than ten minutes before trial, failing to investigate and prepare for trial, failing to effectively cross-examine the desk clerk at trial, and failing to object during the prosecutor's closing argument. Because defendant failed to move for a new trial or for an evidentiary hearing in the trial court, and because this Court denied defendant's motion to remand for an evidentiary hearing,[3] our review of this issue is limited to errors apparent on the record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999).

In *Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001), this Court set forth the rules governing claims of ineffective assistance of counsel:

> To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2 315 (1991), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

In *People v Mitchell*, 454 Mich 145, 166-167; 560 NW2d 600 (1997), our Supreme Court stated that "the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such. If counsel is a reasonably effective advocate, he meets constitutional standards irrespective of his client's evaluation of his performance" (internal citation and quotation marks omitted). The record in this case establishes that defense counsel was proficient and well-prepared and that he was a zealous advocate for defendant throughout the proceedings. At the sentencing hearing, the trial court described defense counsel's performance as follows:

[3] *People v Jenkins*, unpublished order of the Court of Appeals, entered July 11, 2006 (Docket No. 266236).

> Mr. Jenkins, first, you couldn't have—you could not have gotten, in my opinion, and I see a lot of attorneys here, you could not have gotten better representation in this county from any other attorney than what Mr. McGinnis provided you. I guar—and I don't say that for any—even to compliment or patronize Mr. McGinnis in any way. He was very vigorous. He challenged the prosecutor every step of the way that he could. As I told him the other day, he made the trial difficult.
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> [H]e pushed every button. He explored every possibility. He looked under every rock he possibly could to assert a defense and put forward a strategy for you and it was one of the finest I've seen.

A defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Nothing in the trial court record supports defendant's claim that defense counsel only met with him for ten minutes before trial. Moreover, the record does not support defendant's assertion that defense counsel failed to investigate the case and adequately prepare for trial. Defendant failed to make any showing of what further investigation or preparation by defense counsel would have produced. Moreover, he failed to establish that, had he met with defense counsel for a longer period of time before trial, a reasonable probability existed that the result of the trial would have been different. *Knapp, supra* at 385. "When making a claim of defense counsel's unpreparedness, a defendant is required to show prejudice resulting from this alleged lack of preparation." *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Defendant is not entitled to relief.

Defendant argues that defense counsel was ineffective for failing to thoroughly and effectively cross-examine the desk clerk concerning his inconsistent statements about the remark made by one of the perpetrators during the robbery. The desk clerk testified at the preliminary examination that he heard one of the perpetrators say something like "let's go Corn," and he testified, at trial, that he heard one of the perpetrators say "Hey, Corn, let's go." Defendant failed to present any evidence in support of his allegation that the discovery materials contained a different statement. Thus, he failed to establish that the desk clerk made significantly inconsistent statements that should have been explored on cross-examination. This Court will not search the record for factual support for a party's claims. See *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004). Moreover, the desk clerk's testimony tended to prove that an individual nicknamed "Corn," was one of the perpetrators of the armed robbery. Kendra testified at trial that defendant's nickname was "Acorn." Thus, the statement "Hey, Corn, let's go" was highly probative of defendant's guilt in this case. Consequently, it is reasonable to conclude that defense counsel decided not to question the desk clerk about the statement in an attempt to avoid calling attention to the statement. Decisions regarding whether to question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant failed to overcome the presumption that defense counsel's decision not to question the clerk about the perpetrator's statement was sound trial strategy. *Knapp, supra* at 385-386. Counsel's cross-examination of the clerk was adequate.

Defendant also argues that defense counsel was ineffective for failing to object during the prosecutor's closing argument. The record reveals that that the prosecutor's argument regarding the aiding and abetting theory was consistent with MCL 767.39. Moreover, his other challenged arguments were based on the evidence presented in the case. "A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). Thus, the prosecutor's closing argument was not objectionable. It is well established that defense counsel is not ineffective for failing to make a futile objection. See *People v McGhee*, 268 Mich App 600, 627; 709 NW2d 595 (2005). Defendant failed to overcome the heavy burden of proving that he received ineffective assistance of counsel in this case. See *Rockey, supra* at 76.

Defendant next contends that the trial court erred in scoring offense variable (OV) 9, MCL 777.39, and OV 10, MCL 777.40, and that he is therefore entitled to resentencing. Issues concerning the proper application of the statutory sentencing guidelines are reviewed de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). This Court reviews the trial court's factual findings for clear error. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

Under the version of the sentencing guidelines in effect at the time of the crime and defendant's sentencing, a trial court was to assess ten points under OV 9 if there were between two and nine victims. MCL 777.39(1)(c). The court was to have assessed zero points under OV 9 if there were fewer than two victims. MCL 777.39(1)(d). When determining the number of victims, the trial court was to have "[c]ount[ed] each person who was placed in danger of injury or loss of life as a victim." MCL 777.39(2)(a). In this case, the trial court found that both the desk clerk and the hotel itself were victims of the armed robbery. The trial court's finding was erroneous because the desk clerk was the only victim of the armed robbery for purposes of scoring OV 9. The trial court was to have assessed points under OV 9 only if there was "a danger of physical injury." *People v Melton*, 271 Mich App 590, 592; 722 NW2d 698 (2006). The Legislature did not intend for trial courts to score OV 9 for nonphysical injuries. *Id.* at 595-596. Thus, a business that suffered financial loss did not constitute a "victim" under the version of OV 9 in effect at the time of the crime and defendant's sentencing. Although the hotel in this case suffered a financial loss, the trial court erred in finding that the hotel was a victim of the robbery. *Id.*[4]

[4] We note that this sentencing error arises because the special panel in *Melton, supra*, overruled *People v Knowles*, 256 Mich App 53; 662 NW2d 824 (2003), which was the controlling case when the trial court sentenced defendant. The trial court's ruling was consistent with *Knowles*. We further note that MCL 777.39 has been amended, effective March 30, 2007, to provide for (A) ten points if there were two to nine victims placed in physical danger or four to nineteen victims placed in danger of property loss and (B) zero points if there were fewer than two victims placed in physical danger or fewer than four victims placed in danger of property loss. The amendment, even if applied to defendant's situation, does not materially affect the score to which he is entitled.

In calculating a sentencing guidelines range, a trial court must assess fifteen points under OV 10 if predatory conduct was involved. MCL 777.40(1)(a). "Predatory conduct" is "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). The timing and location of an assault may evidence preoffense predatory conduct. See *People v Apgar*, 264 Mich App 321, 330; 690 NW2d 312 (2004), and *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003). Even assuming, for purpose of argument, that the hotel could properly be considered a "victim" here, the trial court erred in scoring OV 10 because the evidence in this case did not support the trial court's finding that defendant engaged in preoffense predatory conduct. *People v Cox*, 268 Mich App 440, 453-454; 709 NW2d 152 (2005). Trial testimony indicated that defendant was at the hotel weeks before the robbery and that he stayed at the Extended Stay next to the hotel on the day of the robbery. However, trial testimony also established that defendant recently moved out of his apartment and that he and Kendra had been staying in hotels for weeks. The evidence in this case simply did not support a finding that defendant was familiarizing himself with the hotel or the hotel staff or that he was preparing and planning to attack the desk clerk. It cannot be inferred from the evidence in this case that defendant watched the hotel and waited for an opportunity when he would be alone to commit the crime.

If OV 9 and OV 10 had been scored at zero, defendant would have been placed at OV Level II after the calculation of the guidelines. The appropriate sentencing guidelines range for OV Level II in this case is 81 to 135 months' imprisonment. MCL 777.62. Defendant's minimum sentence of 144 months exceeds the range provided by the statutory sentencing guidelines. Thus, we remand for resentencing. See MCL 769.34(10).[5]

Finally, defendant argues that he was sentenced in violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Defendant's argument is without merit because "the Michigan system is unaffected by the holding in *Blakely* . . . ." *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006), quoting *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

We affirm defendant's conviction, but remand for resentencing. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Patrick M. Meter

[5] We decline to consider the prosecution's argument that defendant should have received a greater score for OV 8. We conclude that the prosecution, in essence, is seeking a better result than it obtained at the sentencing hearing and therefore should have filed a cross-appeal in order to raise this argument. *Ass'n of Businesses Advocating Tariff Equity v Public Service Comm'n*, 192 Mich App 19, 24; 480 NW2d 585 (1991).